

CANADA / JUDGMENT

S.T.T. v. T.C.T.

2023 BCSC 903

COURT

Supreme Court of British Columbia

DECIDED

30 May 2023

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2023 BCSC 903 S.T.T. v. T.C.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.T.T. v. T.C.T.,

2023 BCSC 903

Date: 20230530

Docket: E60495

Registry: New Westminster

Between:

S.T.T.

Claimant

And

T.C.T.

Respondent

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Claimant:

G.K. Thomas

Counsel for the Respondent:

R. Huinink

Place and Date of Hearing:

New Westminster, B.C.

November 2 & 3, 2023

Place and Date of Judgment:

New Westminster, B.C.

May 30, 2023

Introduction

- [1] This is an application by the claimant pursuant to Rule 10-5(2)(c) of the Supreme Court Family Rules to vary the separation agreement (and a subsequent agreement amending it) that he entered into with the respondent. The basis for the variation is a decline in his income since it was entered into, which he says should reduce his spousal support obligations to the respondent, both retroactively and prospectively. The retroactive variation would substantially decrease his current arrears of support, which exceed \$100,000.
- [2] In any event, he seeks to have his spousal support obligations end no later than May 2024.
- [3] He also seeks to vary the requirement that was imposed on him by the separation agreement to maintain a \$1 million life insurance policy to secure his spousal support obligations, which are no longer as significant as they were when that figure was arrived at.
- [4] The respondent opposes the part of the application that deals with spousal support. She argues that the claimant underreported his income for the years in question, with the effect that he did not pay her the appropriate amount of support under the Spousal Support Advisory Guidelines. She also seeks to attribute to him part of the income that he pays his current spouse, as well as other inappropriate deductions. More generally, she questions whether the decline in his income is of a permanent nature, and says he has not made sufficient disclosure to allow the court to properly scrutinize his claim.
- [5] She concedes that the claimant's remaining support obligations can be secured by a life insurance policy with a lower value.

Background

- [6] Both parties are 69 years old. They began a marriage-like relationship in 1993, and married in 1994.
- [7] They did not have any children together, but their young children from previous relationships formed part of their family unit once their relationship began.
- [8] They separated in 2013 and were divorced in 2016.

- [9] The claimant is a lawyer, practising primarily in the area of family law. He carries on his practice through a law corporation.
- [10] Before her relationship with the claimant, the respondent was a realtor. During their relationship, she became the office manager for his firm. While she performed that role, she was paid a significant salary, which served as an income-splitting vehicle for the claimant's tax purposes.
- [11] During the marriage she also trained as a counsellor, although she has earned limited income in that role since then.
- [12] The parties entered into the initial separation agreement in November 2015.
- [13] On the issue of spousal support, the important features of the agreement were that:
- The respondent would remain employed at the law firm until the end of that year, and would draw \$7000 per month for each of November and December;
 - The claimant would pay the respondent support of \$7000 per month, beginning in January 2016;
 - There was a formula for calculating support once the parties' 2015 tax information became available in June 2016. It addressed their income-splitting for tax purposes in 2015. Under it, the claimant's income was to be based on the sum of his and the respondent's net taxable incomes in 2015, while the respondent's income was to be based on her projected income for 2016, using either her earnings in the first five months or \$10,000, whichever was higher. Support at the mid-range under the SSAGs based on those incomes would be paid to the respondent, retroactively to January 1, 2016;
 - The parties were to exchange income information each year, including their tax returns and notices of assessment;
 - If they engaged in income-splitting (with other spouses, I infer) in the future their incomes for support purposes were to include it;
 - Effective July 1, 2017, they were to adjust the support in accordance with the SSAGs, based on their respective incomes;
 - Either party could seek to vary the support if certain events occurred, including that a party's income was reduced "for reasons beyond [their] control", including "voluntary retirement or semi-retirement", or that their income increased by more than 15%;
 - The agreement would terminate on the death of either party, or the respondent's remarriage;
 - For as long as support was payable, the claimant was required to maintain the life insurance policy that I have described, with the respondent as the beneficiary.
- [14] The agreement equally divided what were described as the "remaining" proceeds of sale of the former family home, which had already been sold.

- [15] The claimant retained his law practice, with the question of whether it had any value that would require compensation to the respondent for her interest in it to be determined by a business valuation. (The valuation was completed in 2016, and concluded that the firm had no marketable value.)
- [16] The respondent retained her home in Chilliwack, which was described in the agreement as having been purchased from her share of the sale proceeds of the family home.
- [17] The agreement also equalized the parties' RRSPs, and allowed them to apply for division of each other's Canada Pension Plan earnings.
- [18] In October 2018, following a mediation, the parties entered into an "amending agreement" to the original agreement.
- [19] It provided that the claimant would pay the respondent spousal support of \$8000 per month, starting November 1, 2018, "subject to s.17 of the Divorce Act" (which deals with the variation of orders). It also provided that the claimant's retirement after the age of 68 would constitute a material change of circumstance for the purposes of that section of the Act, but that an increase in the income of either party would not constitute such a change.
- [20] The claimant was to pay \$45,000 to satisfy any retroactive support or arrears arising from the original agreement
- [21] Both agreements have been filed with the court and so, pursuant to s. 163 of the Family Law Act, they are enforceable under that legislation as though they were orders.
- [22] The claimant has remarried. His current spouse performs a similar role in his law practice to that previously preformed by the respondent, and is paid accordingly.

The Claimant's Position

- [23] He deposes that his income suffered a severe setback in December 2019, when three of the four associate lawyers at his firm left, taking virtually all of their work with them. The fourth associate left in March 2020. These departures deprived him of his share of their billings, leaving him to depend only on his own billings and those of an articulated student.
- [24] The timing of these departures was particularly unfortunate, he explains, because in June 2019, anticipating that his firm would continue to grow, he had moved it to a larger office space and spent more than \$250,000 on improvements to it, taking on a loan in order to do so.
- [25] In addition, the firm's line of credit was overdrawn, requiring him to contribute \$50,000 from his personal line of credit to correct the situation. He also refinanced his own home and put the \$160,000 thus obtained into the firm.
- [26] In March 2020 the COVID-19 pandemic hit, and the resulting court closures further reduced his ability to earn income.

- [27] In addition to the injection of his personal financial resources into the firm, he obtained emergency wage subsidies and business loans from the federal government, pursuant to its COVID relief programs. He believes that but for these efforts the firm would have closed.
- [28] He attempted to revitalize the practice by taking on four associates who had recently left a personal injury firm. However, that arrangement proved not to be viable financially for him, requiring him to terminate it after a short time. He suffered an overall loss by the time of those associates' departure, due to the infrastructure costs that he had incurred to support their practices.
- [29] As of his most recent affidavit, sworn in April 2022, he and his staff occupied a total of four offices. He was leasing another office to a mediator on a month-to-month basis. He hoped to employ his current articulated student as an associate once that student had been called to the bar, which would take up another vacant office. That would leave one more vacant lawyer office, which he was attempting to rent out, and three unoccupied staff work stations.
- [30] He had hired his former articulated student as an associate in March 2021, but that associate left the following year to work in an office closer to his home. He says that "based on the current work flow" there is no need to hire an associate to replace that departed one, because his current student is expected to slot into that role.
- [31] He describes having another student, who is currently working as a paralegal but waiting to begin her articles.
- [32] To support his version of events, the claimant provided a report by Patti Daum, an experienced business valuator, which was prepared in April 2022. She calculated his income for the years 2018-2021, taking into account the potential sources of income to pay support that are set out in the Federal Child Support Guidelines (the FCSGs are also basis of income calculations for spousal support under the SSAGs). She had access to the claimant's personal tax returns and the financial information relating to his law corporation.
- [33] Ms. Daum calculated his income for those years as:
- 2018: \$438,000
 - 2019: \$361,000
 - 2020: \$243,000
 - 2021: \$216,000
- [34] The claimant accepts Ms. Daum's calculations for 2020 and 2021 even though his own belief, based on reports from his accountant at the time, is that he had income in the range of only \$120,000.
- [35] His most recent financial statement, also from April 2022, listed his income for support purposes as \$175,533. This was based on his 2021 tax return.

- [36] In his affidavit sworn the same month, he deposes to a current income of \$205,000 per year, and says he does not foresee being able to increase that amount in the future.
- [37] Despite these figures, he is prepared to accept Ms. Daum's figure of \$216,000 as his income for 2021, and for the purpose of calculating his ongoing support.
- [38] He paid support in accordance with the agreement and amending agreement until March 2020, when he reduced it to \$4,000 per month. In November of 2020 he reduced it again, to \$2500 per month. In March 2022, he increased those payments to \$3250 per month.
- [39] Under the amount of support required by the current agreement, he was \$110,525 in arrears as of April 2022. (The respondent's counsel updated this to approximately \$143,000 as of the application dates.)
- [40] He says that when the share of his pension benefits that the respondent now receives pursuant to the agreement are added, the total support is \$3700 per month. The Family Maintenance Enforcement Program is collecting an additional \$712 per month from him towards his arrears, for total support of \$4418.
- [41] He is content to raise his monthly support payment to \$3706 per month to maintain that total, and says that if the collection by the FMEP ends pursuant to the recalculation of arrears that he seeks, he will pay the full \$4418 to the respondent directly.
- [42] The claimant's counsel submits that his spousal support should be calculated on the basis of the incomes attributed to him in the Daum report in 2020 and 2021, with at least \$30,000 being imputed to the respondent to represent what she is reasonably capable of earning. Counsel seeks to have the low range of support under the SSAGs applied in each calculation.
- [43] The results of this approach would be:
- 2020: respective incomes for the parties of \$243,000 and \$30,000 yield a low range of \$5059 per month, or \$60,708 per year. Subtracting the \$53,500 that the respondent paid that year leaves arrears of \$7,208.
 - 2021: respective incomes of \$216,000 and \$30,000 yield a low range of \$4418 per month, or \$53,016 per year. Subtracting the \$47,161 that the respondent paid that year leaves arrears of \$5,854.
- [44] He seeks to have any amounts that exceed these shortfalls forgiven.
- [45] For the period of 2022 until the filing of his application materials in April, and on an ongoing basis, he seeks to apply Ms. Daum's 2021 income calculation, and the same imputed income for the respondent. This would result in the claimant paying \$4418 for those four months and on an ongoing basis.

- [46] As an alternative, the claimant's counsel asks that I consider the possibility that the respondent is actually reasonably capable of earning \$50,000 per year. This would make the low range payment under the SSAGs \$4584 for 2020 and \$3942 for 2021, early 2022 and going forward, and would eliminate his arrears for 2020-21 entirely.
- [47] In addition to raising this change in the claimant's income in the years following the agreement, his counsel argues that the respondent has not made reasonable efforts to earn income - instead relying almost completely on the support that the claimant provides. This lack of effort towards self-sufficiency is said to be inconsistent with the needs-based component of the support she is receiving.
- [48] From 2017-2019 she had no employment income, and business income of less than \$2000. In 2020 and 2021 her income, aside from the spousal support, came only from Old Age Security and CPP payments, of \$18,404 and \$18,637 respectively. Her most recent financial statement, which was filed in March 2021, listed her income, aside from spousal support, as \$14,850, consisting of CPP and rental income.
- [49] She has not provided her tax returns or notices of assessment for 2020 and 2021, only the tax summaries for those years, and has failed to file an updated financial statement for 2022.
- [50] Counsel submits that the respondent's explanations of her efforts to develop a viable business as a counsellor are vague, and lack any reliable supporting material. In particular, she does not satisfactorily explain the effect of her move from Langley to Chilliwack on her counselling client base, and the extent of her ability to continue to provide services to her Langley clients by video.
- [51] The same lack of detail undermines her claims to have engaged in meaningful searches for alternative jobs, including as a respite care worker, he argues.
- [52] Finally on this topic, her reference to her earning ability being affected by fibromyalgia is not supported by any medical evidence.
- [53] With respect to the insurance policy, the claimant's counsel points out that because of the length of time for which the claimant has been paying support to the respondent, the amount of as-yet unpaid support that needed to be secured by such a policy is significantly lower than it was at the time of the original agreement. This makes it appropriate to reduce the value of the policy substantially.
- [54] He projects that at the claimant's current income, it would take no more than \$65-\$70,000 to secure the obligation to his intended retirement date, which is the expiration of his firm's current lease in May 2024, when he will be 71.
- [55] Because of his age and some recently emerging medical issues, the claimant's premiums to maintain the existing level of coverage exceed \$26,000 per year, which is more than six times what he was required to pay when he entered into the original agreement.

- [56] One potential solution raised by his counsel is for him to retain the current policy, but be authorized to apportion the proceeds in excess of what is currently required as security for spousal support to other beneficiaries.

The Respondent's Position

- [57] Her counsel's overall submission is that the agreements should continue to be enforced in their entirety, and that the level of disclosure provided by the claimant on this application falls far short of what would be needed to consider a variation.
- [58] An important consideration when assessing the current fairness of the agreement is the purpose that was originally to be achieved by its spousal support provisions. Her counsel submits that it reflected the respondent's strong compensatory support claim at that point.
- [59] The respondent deposes that during the relationship she cared for all of the family's needs, and that those responsibilities prevented her from acquiring skills outside of the home or her role in the law practice.
- [60] When the relationship with the claimant began, she was supporting herself and her 11-year old daughter in a comfortable lifestyle on her income as a realtor, and owned her own home. The claimant shared in the care of his two pre-school aged children with his former spouse at that time.
- [61] She says that she ceased working in real estate by agreement with the claimant, based on her responsibility for caring for the three children. This enabled the claimant to devote valuable time to his practice and generate a considerable revenue stream, which increased after separation.
- [62] Her work in his practice, which she "learned by doing" without any prior training, was initially part-time, to allow her to carry out her responsibilities for child care. In the ensuing years, her hours of work and the extent of her role in the law firm increased.
- [63] By the claimant's own admission, the respondent's salary as an office manager was an exercise in income-splitting for tax purposes, and her counsel submits that it is safe to assume that the bulk of the income that was attributed to her in that role over the years was actually his. The references to income-splitting in the first agreement, and the use of the sum of the parties' incomes to calculate the claimant's support obligation, are clear indications that the income attributed to the respondent as office manager was intended only to pass muster with the Canada Revenue Agency.
- [64] In that regard, the respondent deposes that the \$100,000 salary that she was earning for her work at the firm at the time of separation likely "exceeded what the market would otherwise have paid", but since it could be shown as an expense of the law firm, "the overall tax position of the family was therefore optimized".

- [65] The default imputation of an income of \$10,000 per year to her in the formula for calculating the support in the first agreement is said to be the best evidence of what the parties jointly considered to be her actual income-earning ability at that time.
- [66] Her training as a counsellor, which resulted in her being accredited in 2010, was never intended to be her primary source of income, she deposes. It was obtained from an organization that is not widely recognized in the field. Its limitations included the ineligibility of her clients for funding of their sessions through employee assistance programs, which forms a significant portion of many counsellors' incomes. She lacked the academic qualifications for a more mainstream program, and knew going into this one that the outcome would not be as lucrative.
- [67] She used one of the offices in the law firm for her practice, and was able to build up a base of short-term clients through contact with the claimant's family law clients, but her inability to develop longer-term therapeutic relationships with them restricted her income to the limited amounts that I have described.
- [68] The point, as I took it, is that it is misleading to characterize her counselling work as an intended pathway to eventual self-sufficiency - it was only ever going to be a side business.
- [69] The respondent's current situation is also important to consider, her counsel submits. I took this evidence to be relevant both to how the compensatory aspect of the spousal support provisions have played out, and to the current extent of her needs-based support.
- [70] To the extent that she developed any clientele as a counsellor when she practiced out of the law firm offices, they were not willing to follow her to Chilliwack, where she purchased her home due to lower housing prices, and her departure from the claimant's office meant that she did not receive any additional business from among his family law clients. This lack of clients, which was exacerbated by the pandemic, led her not to renew her counselling licence in 2020.
- [71] She deposes that her fibromyalgia, which she has had since the birth of her daughter and suffered from during her relationship with the claimant, has worsened. It causes her pain all over her body, fatigue, sleep problems and "often" emotional and mental distress. The fatigue inhibits her ability to work long hours. While she has not provided any medical evidence of this condition, her counsel submits that it is the symptoms that she describes and their effect on her ability to work that are relevant, not a formal diagnosis.
- [72] In her March 2021 affidavit, she describes seeking to obtain more income by renting out a suite in her home (which she previously intended to use for her counselling practice) for \$1200 per month. She was also in the process of applying to be a respite care worker for a local community living society, which would pay \$20 per hour.

- [73] Despite this evidence about her efforts to earn an income, her counsel suggests that because the amendment agreement provided that an increase in either party's income was not a basis to vary it, the question of whether she should reasonably have increased her income since then is essentially moot.
- [74] A further argument is that there were difficulties with the sufficiency of disclosure by the claimant before the agreement and the amending agreement were arrived at.
- [75] Until his more recent problems, the claimant's income had increased substantially after 2015. The respondent's counsel submits that when he entered into the first agreement in November of that year, he would already have had a good idea that 2016 was going to be a "banner year".
- [76] Counsel further suggests that the claimant wanted the clause in the 2018 amending agreement that an increase in income would not amount to a change in circumstances because he was aware that his income would continue to increase.
- [77] His financial statement from October of that year described his income as \$260,287 and he ticked the box on the statement that indicated that he did not anticipate any significant changes in that income, even though his income for that year ended up being \$355,000. Counsel submits that as a family law practitioner, the claimant would have been well aware of the significance of that assertion about anticipated changes, and that he must also have known that a much higher income for the year than he was swearing to was in the offing.
- [78] The result, it is argued, was that on his actual income up to the financial reversal in 2020, the claimant significantly underpaid the respondent based on what the SSAGs would have required, if they had been applied on an ongoing basis. This was despite the fact that the original agreement expressly contemplated a yearly adjustment of the amount of support, to reflect changes in the parties' incomes.
- [79] More fundamentally, the respondent's counsel submits that if he had disclosed his expected income for 2015 and 2018 when he entered into the original and amended agreements respectively, she would never have agreed to those amounts of support.
- [80] Turning to the claimant's post-separation income and the appropriate adjustments to it for support purposes, the respondent's counsel submits that other than the additional tax benefits that he derives from its corporate structure, there is no meaningful difference between the claimant's law corporation and a sole proprietorship, in terms of its role in generating his income. He has a certain fixed set of expenses, and his income is entirely driven by the practice's revenues.
- [81] Counsel does not take particular issue with Ms. Daum's methodology. The problems are instead that she does not have current information about the claimant's law corporation (her analysis ends as of the last annual report in July 2021), and that she relied on certain deductions from that the claimant's income that are not justified.

- [82] She noted that the claimant receives rental income from an investment property that he owns jointly with his current spouse. Under the Income Tax Act he is permitted to deduct expenses from it, but in reality, according to counsel, it is being used to pay down debt on a revenue property, as a form of investment. Counsel submits that therefore his 50% share of the gross rental income should be included in his income for support purposes.
- [83] Counsel also questions deductions for amortization, which are allowed under the CRA on the theory that the payor is saving to replace the depreciating items. Given the claimant's stated intention to retire in 2024, such a replacement is unlikely to be carried out.
- [84] Most significantly, Ms. Daum pointed out that "non-market" salaries were paid to the claimant's spouse in 2018 and 2019 as a form of income-splitting (just as they were to the respondent), and she added back what she assessed as the "non-market" portion of the payments to his spouse back into his income.
- [85] Based on the Hays Salary Guide, which I take to be an accepted reference on this issue, Ms. Daum identified a range of \$50,000-\$80,000 for the spouse's position in the law firm, and situated the spouse at \$70,000 within that range, based on the claimant's description of her extensive duties. For 2018 and 2019, the resulting add-backs to his income at that market salary were \$10,000 and \$30,000 respectively. The respondent's counsel submits that the spouse's salary is more inflated than that and the added-back portion should be \$30,000 per year throughout the analysis.
- [86] The current spouse's income for 2020 was not disclosed by the claimant. For 2021, it was gleaned from the reference to it in the claimant's tax return, although it was not broken down by source. (In April 2021, the spouse deposed that she earns approximately \$38,000 per year from operating her own cleaning business.)
- [87] The respondent's counsel characterizes it as "alarming" that the spouse's income as shown on that return was \$166,665 - substantially higher than what the claimant reports for himself for that year, and inevitably derived to a meaningful extent from salary paid to her as a non-arm's length party by the claimant. This was all being done, counsel notes, while the claimant was maintaining that he could not afford to continue at his present level of spousal support.
- [88] We also do not have evidence of the extent of the spouse's contribution to the claimant's family expenses, but it is reasonable to infer, the claimant's counsel argues, that she shares equally in household expenses, for example, of the mortgage on their family residence.
- [89] Applying Ms. Daum's actual income figures, with the adjustments that counsel has argued for, shows the amounts that the claimant should have paid in spousal support during the relevant period:

Year

Claimant's Income

Respondent's Income

Add-ins

Monthly Support

Shortfall based on actual payments

2018

\$438,000

\$12,000 (imputed)

None

\$12,425

\$53,100

2019

\$361,000

None (only CPP and RRSP)

None

\$10,529

\$30,348

2020

\$243,000

\$10,000 (imputed)

\$25,000 (income splitting and rental income)

\$7569

Below monthly amount in amended agreement

(Would be close to that amount if no income imputed)

2021

\$216,000

None

\$25,000 (income splitting and rental income)

\$7088

Below monthly amount in amended agreement

- [90] The respondent's counsel submits that the significant amounts that the claimant underpaid in 2018 and 2019 based on the SSAGs have been allocated instead to increasing his own asset base. In addition to a principal residence that he acquired shortly after the first agreement, which has increased in value since then, he and his current spouse also have the rental property to which I previously referred.
- [91] In short, when looked at holistically, the agreement was actually somewhat unfair to the respondent, her counsel submits, but she is prepared to live with it if she is fully compensated according to its terms.
- [92] With respect to the reduction in the claimant's income, the respondent's counsel concedes the legitimacy of the departure of the claimant's associates and its impact on his income as of 2020, but points out that as of the dates of this application the problem had occurred 34 months previously. Much more could have been done in the interim to increase his income (and explained to the respondent). Counsel describes the extent of any explanation of the claimant's efforts to improve the situation in his practice as "black paint on top of opacity". As of the hearing dates, his most recent disclosure of his corporate documents was from July 2021. Counsel refers to extensive correspondence he had with the claimant while the claimant was representing himself, in which he sought unsuccessfully to obtain information about the firm's finances. He characterizes the responses he received from the claimant as unhelpful - shielding behind unjustified claims of confidentiality, or offering an explanation that amounted to "word and number salad".
- [93] Counsel submits that as a result we do not have sufficient current information on which to conduct an analysis of how the law practice is actually doing.
- [94] Based on the information we do have, the decline in the claimant's income is clearly only a temporary interruption in his fortunes, it is argued, which can be remedied readily by renting offices to additional fee-sharing lawyers.
- [95] To the extent that a permanent change in circumstances underlies his application, it has not been demonstrated on the evidence. Put another way, counsel submits that the change to the claimant's income in 2020 "was real but recoverable".
- [96] As the counsel frames it, the real question has always been how long the claimant's financial setback would last, and what a reasonable schedule would be for getting his payments of support back on track and catching up on his arrears.
- [97] As to the reduction in the claimant's life insurance, counsel suggests that a value of \$250,000, which it appears would provide adequate security for any shortfall, is acceptable.

Governing Principles

Procedure

[98] Pursuant to Rule 10-5(2)(c) of the Supreme Court Family Rules an application to vary a settlement agreement that has been filed with the court is to be dealt with by a chambers application: *Halliday v. Halliday*, 2015 BCCA 82 at para.59.

[99] In confirming this point, the Court in *Halliday* added a note of caution:

61 Given the numerous factual issues that will almost always be in play on such applications, it is most difficult to envision many circumstances in which a contested application to set aside or replace an agreement filed under R. 2-1 could be determined by way of a summary application.

[100] In *C.M.R. v. L.F.R.*, 2019 BCCA 371 at paras.11-13, clarified that the requirement in *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.*, 2017 BCCA 247, that a petition be referred to the trial list when there are triable issues, also applies to chambers proceedings under Rule 10-5(2)(b) of the SCFRs to change a final order.

[101] I can see no principled basis on which C.M.R. should not apply equally to chambers proceedings like the present one under Rule 10-5(2)(c). Like changes to final orders, variations of separation agreements "are of vital importance to the parties", as C.M.R. put it (at para. 15).

[102] A triable issue has been described as a "dispute as to the facts or law which raises a reasonable doubt or which suggests that there is a defence that deserves to be tried": *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 (C.A.) at 59. It is the same test that is applied on an application for summary judgment. *Saputo* required a referral to the trial list when such an issue arose, unless the party requesting the trial was "bound to lose", as described in *Robertson v. Dhillon*, 2015 BCCA 469 at para. 56.

[103] However, in *Cepuran v. Carlton*, 2022 BCCA 76, a five-member panel overruled *Saputo*, and held that a judge who identifies such triable issues has greater flexibility in directing how they will be resolved:

160 ...[A] judge hearing a proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the proceeding itself to assist in determining the issues... For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

166 At a minimum, when considering whether to order the use of hybrid procedures within the proceeding itself, or to refer the matter to trial, the court will need to be mindful of the object of the Rules set out in R. 1-3: to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding.

- [104] This analysis must not be confused with the test for whether an action can be resolved by summary trial under Rule 9-7(15)(a), which is based on whether the court is able to find the necessary facts to decide the matter and whether it would be unjust to proceed in that manner.
- [105] At para. 165 of *Cepuran* the Court "commended" a list of factors that may be relevant when deciding to convert a petition proceeding to an action from *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, at para. 39. This list was in turn drawn from *Haagsman v. British Columbia (Minister of Forest)* (1998), 64 B.C.L.R. (3d) 180 (S.C.) at paras.46-47. Those factors are:
- (a) the undesirability of multiple proceedings;
 - (b) the desirability of avoiding unnecessary costs and delay;
 - (c) whether the particular issues involved require an assessment of the credibility of witnesses; and
 - (d) the need for the Court to have a full grasp of all the evidence; and
 - (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.
- [106] The Court added at para. 166 that "[t]he factors that may be relevant will evolve with time and the circumstances of a particular case."
- [107] There is no reason why this greater flexibility would not also be equally available when triable issues arise in applications under the SCFRs. As a result, if I identify triable issues in the present case, I must still consider whether hybrid procedures will be sufficient to resolve them, rather than simply directing that there must be a full trial. In addition, as *C.M.R.* (which was decided before *Cepuran* clarified the availability of these procedures), pointed out at para.14, a chambers proceeding that has been ordered to the trial list can always proceed as a summary trial, if it is otherwise suitable.

Test for Variation

- [108] Counsel focused their submissions on s. 164 of the Family Law Act, which deals with the ability of a court to vary a separation agreement.
- [109] Section 164(3) addresses shortcomings in the formation of the agreement, which are not being alleged by the claimant here. Rather, he relies on s.164(5), which addresses situations in which subsequent events have affected the agreement's fairness:

(5) Despite subsection (3) [deficiencies in the formation of the agreement] the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

- (a) the length of time that has passed since the agreement was made;
- (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
- (c) the intention of the spouses, in making the agreement, to achieve certainty;
- (d) the degree to which the spouses relied on the terms of the agreement;
- (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

[110] In his submissions the claimant's counsel sought to equate the substantial unfairness described in this section with the "material change in circumstances" test for varying a spousal support order, suggesting that finding of the latter also indicates the former.

[111] I am unable to agree with this proposition - the variation of agreements has its own specific set of considerations. The distinction was helpfully explained in *Megson v. Megson*, 2014 BCSC 2467:

161 s. 164(5) requires consideration of all the enumerated circumstances in determining whether an agreement has become significantly unfair. While it may be that a change in circumstances is the most dominant consideration, regard would have to be paid to all the other considerations including: the length of time that has passed since the agreement was made; the intention of the spouses, in making the agreement, to achieve certainty; and the degree to which the spouses relied on the terms of the agreement. These additional considerations could not possibly operate to lessen the burden the claimant has to meet to obtain a variation of the spousal support terms of the agreement. If anything, they elevate the burden he must meet.

[Emphasis added.]

[112] Although it dealt with the test for departing from an equal division of property under s. 95 of the FLA, the definition of "significantly unfair" in *Remmem v. Remmem*, 2014 BCSC 1552 is also helpful here:

44 The Concise Oxford English Dictionary defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact - something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness ...

- [113] In addition, the claimant's counsel submits that s.17 of the Divorce Act is also applicable, and can be resorted to if required. I am also unable to agree with this position.
- [114] It was suggested in *Ashton v. Ashton*, 2015 BCSC 790, at para. 43, that s. 164, as a whole, effectively codifies the analysis of contractual arrangements for spousal support, as it was described in *Miglin v. Miglin*, [2003] 1 SCR 303.
- [115] However, while the analysis in s.164 may be similar to the one in *Miglin*, the crucial difference that must be kept in mind is that the FLA section deals with varying the actual agreement, while *Miglin* was concerned with what role an existing agreement should play in a court's decision to grant an initial order for spousal support under s. 15.2 of the DA.
- [116] As the Court of Appeal was careful to point out in *Zimmerman v. Shannon*, 2006 BCCA 499 at para. 65, *Miglin* "affirmed the power to order spousal support [that is] inconsistent with a private contract". It did not purport to supersede provincial jurisdiction over civil contracts that relate to spousal support.
- [117] Since the claimant is not seeking an initial order for spousal support that contradicts the agreement, but rather a variation of the agreement itself, and since that can only be granted by provincial legislation, s. 15.2 of the DA does not apply.
- [118] Nor does s. 17 of the DA apply, despite the reference to it in the amending agreement. The filing of an agreement makes it enforceable as an order, but does not convert it into an order, so that it can be varied under that section: *Cominetti v. Cominetti*, [1993] B.C.J. No. 1486, (S.C.) at paras.36-37 (dealing with the same language under the Family Relations Act).

Spousal Support

- [119] For the sake of convenience, I will refer to the summary of the applicable principles that I provided in *Segura v. Segura*, 2020 BCSC 650:

117 The two main bases of entitlement to spousal support are compensatory, which addresses the first two objectives under ss. (6); and non-compensatory, or needs-based, which addresses the second two. The principles governing these basis were set out by the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 SCR 813, and *Bracklow v. Bracklow*, [1999] 1 SCR 420. These principles were helpfully summarized in *Chutter v. Chutter*, 2008 BCCA 507.

118 Dealing first with compensatory support:

- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would ... have been [sic] suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in

assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (Moge, at 861-863; Bracklow, at para. 39). In Moge, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

[51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in Moge at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" ...

[52] The Court in Moge discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement... As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

119 Chutter explained non-compensatory support as follows:

54 Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[120] On the principles underlying non-compensatory, or needs-based support, I will refer to a summary that I provided in Vidican v. Dinu, 2020 BCSC 178:

86 When considering the needs of a spouse for the purposes of non-compensatory support, the question goes beyond their ability to meet expenses. One must consider the marital standard of living and that spouse's post-separation standard: Marquez v. Zapiola, 2013 BCCA 433 (B.C. C.A.) at para.34. It is important to note however, that a mere disparity in the spouse's incomes is not

sufficient to create entitlement (Lee v. Lee, 2014 BCCA 383 (B.C. C.A.) at para.60). Instead "there must at least be some evidence of how the applicant's lifestyle has been diminished and, even then, other factors may have to be considered": Madruga v. Madruga, 2015 BCSC 1605 (B.C. S.C.).

87 As to the objective of promoting self-sufficiency, the frequently-cited decision in Tedham v. Tedham, 2005 BCCA 502 (B.C. C.A.) is helpful:

[33] ...As already stated, however, s.15.2(6) (d) of the [Divorce] Act [echoed in s. 161(d) of the FLA] does not require self-sufficiency, but simply seeks to promote self-sufficiency "in so far as practicable". In determining what is practicable, regard must be had to all of the circumstances, including the age and gender of the spouse, her/his skills and education, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self-sufficient, which may be quite a different matter.

Discussion

[121] I have set out the relevant evidence, the parties' positions and the applicable legal principles in some detail because when they are viewed as a whole, they demonstrate that there are triable issues here.

[122] The most pressing of these are the nature of the change to the income from the claimant's practice - whether it is permanent or transitory - and the sufficiency of his efforts thus far to restore it to its previous level.

[123] To the extent that it impacts on the reduction that is being sought in the claimant's support obligation, there is also the issue of the respondent's efforts towards self-sufficiency since the separation, including the extent to which she is restricted in those efforts by the chronic illness that she describes.

[124] While I might have found one party's position on these issues to be more likely than the other on the basis of the current material, I cannot say that there would not have been at least a reasonable doubt raised by the other party's positions, or that the other party was "bound to lose" with respect to those positions.

[125] Accordingly, this matter must be referred to the trial list.

[126] In reaching this conclusion, I have kept in mind that neither counsel raised a concern in their submissions about my resolving this matter by a chambers proceeding, and they obviously considered that such an approach would be more efficient and economical for the parties. It is also most regrettable that I did not reach my conclusion on this point until the decision had been reserved for some time.

[127] At the end of the day, I think the parties' efforts to incorporate the principle proportionality into their resolution of this matter should be respected as much as possible, if it can be done without creating an injustice.

- [128] I infer from counsel's approach to the present application that they believe that the necessary facts to decide it can be found on the basis of the affidavits, and that it would not be unjust to do so. Therefore, having ordered the matter to the trial list, I am prepared to hear it as a summary trial and decide it on the basis of the current application material and submissions. If they decide to proceed in that manner, counsel may of course also supplement the application record, or make additional submissions, as they see fit.
- [129] Given counsel's position on the sufficiency of the current material I do not see any benefit in preserving the matter as a chambers proceeding and resorting to any of the hybrid procedures, such as cross-examination on affidavits, that are now permitted by Cepuran, but I am certainly prepared to consider that approach if, on reflection, counsel believe that it will be more beneficial.
- [130] Regardless of which specific approach is taken, the goal will be to render a decision on the merits as expeditiously as possible, in light of my inability to decide it in its current form.
- [131] Of course, I am not required to be seized any further if the parties wish to proceed in some other manner.
- [132] I would ask that counsel communicate their preferences through Supreme Court Scheduling. Obviously converting the existing application to a summary trial and proceeding on the current material and submissions will require the agreement of both parties.
- [133] The question of costs for this application will be deferred to the point where there has been a decision on the merits.

"Schultes J."

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